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Automattic Inc. and
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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

AUTOMATTIC INC. and OLIVER HOTHAM,

Plaintiffs,

v.

NICK STEINER,

Defendant.

Case No. 3:13-cv-5413-JCS

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR DEFAULT JUDGMENT AGAINST NICK STEINER

Date: June 27, 2014
Time: 10:30 am
Ctrm: G - 15th Floor
Judge: Honorable Joseph C. Spero

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TO: THE CLERK OF THE ABOVE-ENTITLED COURT

PLEASE TAKE NOTICE that on June 27, 2014 at 10:30am, or as soon thereafter as this matter may be heard, in Courtroom G on the 15th Floor of the above-entitled court of Magistrate Judge Joseph C. Spero located at 450 Golden Gate Avenue, San Francisco, CA 94102, Plaintiffs, by their attorneys Durie Tangri LLP, will move and hereby move for an order granting Plaintiffs Motion for Default Judgment against Defendant under Fed. R. Civ. P. 55(b)(2).

This motion is based on this notice, the Memorandum of Points and Authorities in support of this motion, and the declarations Joseph C. Gratz, Oliver Hotham, and Paul Sieminski filed along with this brief.

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiffs filed their Complaint on November 21, 2013 alleging that they were damaged as a result of Defendant's misrepresentations, bringing a claim under 17 U.S.C. § 512(f). The Complaint alleges that the defendant in this case, a representative of the advocacy group "Straight Pride UK," sent a press statement to Plaintiff Oliver Hotham, a journalist. He later attempted to suppress Hotham's reporting on that press statement through the misuse of copyright law. Hotham had posted the press statement on his blog, which is hosted through the WordPress.com blog hosting service offered by Plaintiff Automattic Inc. ("WordPress.com"). Defendant sent a takedown notice to WordPress.com pursuant to 17 U.S.C. § 512(c), falsely claiming that he had not authorized the publication of the material posted by Hotham. Steiner's knowing material misrepresentations caused harm to Hotham and to WordPress.com.

Congress has recognized the virtue of encouraging service providers that provide internet users with ways to communicate over the internet, store information, post content or locate information using the internet. However, it has also recognized the potential for crippling copyright liability if a service provider were liable for the infringing content that users post or transmit. Thus, Congress passed the Digital Millennium Copyright Act ("DMCA") which limits liability for service providers on the condition that they remove content which copyright holders claim to be infringing. *See generally* 17 U.S.C. § 512.

The DMCA gives a copyright holder the power to cause a service provider, such as WordPress.com, to remove content from its website based solely on an individual's assertion that the site

is hosting infringing content. *See* 17 U.S.C. § 512(c)(3). It also addresses the clear potential for abuse of the system. *See* 17 U.S.C. § 512(f). The DMCA makes "any person who knowingly misrepresents . . . that material or activity is infringing . . . liable for any damages including costs and attorneys' fees, incurred by the alleged infringer." *Id.*

Nick Steiner abused the DMCA process in an attempt to silence a journalist critical of Steiner's organization, Straight Pride UK. Automattic and Oliver Hotham filed this action against Steiner to recover for the damage caused by his misrepresentations for his DMCA takedown notice, which falsely stated that Hotham infringed copyright by reporting on a press release.

I. BACKGROUND

A. Hotham's Article and Steiner's Fraudulent DMCA Takedown Notice

Oliver Hotham is a student journalist with a blog hosted on WordPress.com's website. (Compl. ¶¶ 10, 12.) In May or June of 2013 Hotham read a blog post on a website called BuzzFeed about an organization called Straight Pride UK. (Compl. ¶¶ 20-21.) In July, Hotham wrote to Straight Pride UK, identifying himself as "a student and freelance journalist." (Compl. ¶ 22.) He asked if he could send the organization some questions to "find out a bit about who's involved and what you hope to accomplish." (*Id*.) He sent Straight Pride UK a set of questions on July 30, 2013. (Compl. ¶ 24.) Two days later, Defendant Nick Steiner responded, identifying himself as the "Press Officer" for Straight Pride UK, and attaching a PDF document called "Press Statement – Oliver Hotham.pdf." (Compl. ¶¶ 25-26.) The document was on Straight Pride UK letterhead, had the heading "Statement," and was signed by the "Straight Pride Press Team" giving the email address "press@straightpride.co.uk." (Compl. ¶¶ 27-28; *see id*., Ex. A.)

In August 2013, Hotham posted an article to his WordPress blog at http://oliverhotham.wordpress.com, which stated:

> There has never been a better time to be gay in this country. LGBTI people will soon enjoy full marriage equality, public acceptance of homosexuality is at an all time high, and generally a consensus has developed that it's really not that big of a deal what consenting adults do in the privacy of their bedrooms. The debate on Gay Marriage in the House of Commons was marred by a few old reactionaries, true, but generally it's become accepted that full rights for LGBTI people is inevitable and desirable. Thank God.

> But some are deeply troubled by this unfaltering march toward common decency, and they call themselves the Straight Pride movement.
>
> Determined to raise awareness of the "heterosexual part of our society", Straight Pride believe that a militant gay lobby has hijacked the debate on sexuality in this country, and encourage their members, among other things, to "come out" as straight, posting on their Facebook page that: "Coming out as Straight or heterosexual in today's politically correct world is an extremely challenging experience. It is often distressing and evokes emotions of fear, relief, pride and embarrassment."
>
> I asked them some questions.

(Compl. ¶ 29.) Hotham's article also included the questions he sent to Straight Pride UK and the answers Straight Pride UK sent back in its "Press Statement." (Compl. ¶ 30.)

Apparently unhappy with Hotham's viewpoint, Nick Steiner sent WordPress.com an email demanding that WordPress remove Hotham's post. (Compl. ¶ 31.) The takedown notice accuses Hotham of copyright infringement and demands that WordPress remove the post based on the DMCA safe-harbor provisions in 17 U.S.C. § 512(c) . (Compl. ¶ 32.) Specifically, the Steiner said, "[u]ser http://oliverhotham.wordpress.com did not have my permission to reproduce this content, on Wordpress.com or twitter or tweets, no mention of material being published was made in communications" and that "[i]t is of good faith believe that use of the material in the manner complained of here is not authorized by me, the copyright holder, or the law." (Compl. ¶ 33.) These representations were knowing falsehoods. (Compl. ¶ 35.) Hotham had informed Defendant that he was a journalist, and Steiner drafted and sent the Press Statement with the intent that it be reported upon by Hotham, going so far as to title it, "Press Statement." (Compl ¶ 34.)

Automattic relied on Steiner's misrepresentations and disabled access to the post that Steiner identified. (Compl. ¶ 36.)

Automattic spent significant staff time and resources in reviewing the takedown notice, disabling access to the posts, notifying Hotham of the takedown notice, reviewing Hotham's response, dealing with press inquiries surrounding the takedown and reinstating of the post, and ultimately pursuing this litigation. (Sieminski Decl. ¶¶ 2-11.) Similarly, Hotham himself spend substantial time corresponding with Automattic in an effort to restore the articles that Steiner demanded Automattic remove from its site.

(Hotham Decl ¶¶ 6-7.) Both Automattic and Hotham suffered reputational harm for having their legitimate content illegitimately removed. (Sieminski Decl. ¶¶ 13-15; Hotham Decl. ¶¶ 12-14.)

B. Timeline of Complaint, Service, and Default

Plaintiffs filed this action on November 21, 2013. (*See* Compl., Dkt. 1.) Because Defendant Steiner lives in the United Kingdom, Plaintiffs filed a motion on December 10, 2013 for an extension of time to serve process, (*see* Mot. To Enlarge Time to Serve Foreign Defendant, Dkt. 10), which the Court granted the next day (*see* Order Granting Pl.'s Mot., Dkt. 11). Plaintiffs served Defendant Steiner on December 23, 2013 in accordance with UK law. (*See* Dkt. 14.) Defendant's answer was due on January 13, 2013. *See* Fed. R. Civ. P. 12(a)(1)(A)(i). However, Steiner has still never filed any appearance or answered the Complaint. The Clerk of this Court entered default against Steiner on May 20, 2014. (*See* Dkt. 21.)

II. DEFAULT JUDGMENT

Steiner abused the DMCA process in an effort to silence a reporter critical of his organization and to force WordPress.com to remove legitimate content from its website. Since then, Steiner failed to appear in this Court to answer Plaintiffs' Complaint. Plaintiffs therefore request that this Court enter a default judgment of $5,000 for Hotham, $5,000 for Automattic, and an award of $14,520 in attorneys' fees. *See* Fed. R. Civ. P. 55(b)(2).

A. Rule 55

After the Clerk of the Court enters a defendant's default, the Court takes the well-pleaded facts of the Complaint as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Default judgment is appropriate when the Clerk has entered Defendant's default and the facts of the well-pleaded facts in the Complaint establish Defendant's liability. *See Columbia Pictures Film Prod. Asia Ltd. v. Uth*, 2007 WL 36283 (E.D. Cal. Jan. 4, 2007).

B. Liability

The DMCA creates a cause of action against those who knowingly abuse the notice-and-takedown procedure. *See* 17 U.S.C. § 512(f) . It states that "[a]ny person who knowingly materially misrepresents under this section . . . that material or activity is infringing . . . shall be liable for any

damages, including costs and attorneys' fees, incurred by the alleged infringer . . . or by a service provider . . . ." *Id.*

The information in the press release that Hotham published on his blog did not infringe any copyright because Hotham had permission to publish it. It was a press release, which by its very nature conveys the intent to "release" information to the "press." It was on Straight Pride UK letterhead, bore the heading "Statement," and was signed by the Straight Pride Press Team." (Compl. ¶¶ 27-28.) Furthermore, the file name was "Press Statement – Oliver Hotham.pdf," (Compl. ¶ 26), making explicit that Oliver Hotham, himself, had permission to publish the material.

Steiner knew that his statements to the contrary were false. (Compl. ¶ 35.) Hotham had identified himself as "a student and freelance journalist." (Compl. ¶ 22.) Steiner himself sent Hotham the press release. (Compl. ¶ 26.) Steiner thus made his misrepresentation knowingly. (Compl. ¶ 35.)

Finally, the knowing misrepresentation was material because Automattic would not have disabled access to the post but for Steiner's misrepresentations. (Compl. ¶ 36.)

C. *Eitel* Factors

The Ninth Circuit has set out a multi-factor test for determining whether to grant default judgment. *See Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986). The factors are:

1. The possibility of prejudice to the plaintiff
2. The merits of the Plaintiff's substantive claim
3. The sufficiency of the Complaint
4. The sum of money at stake in the action
5. The possibility of a dispute concerning material facts
6. Whether the default was due to excusable neglect
7. The strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

Id. In this case, the factors weigh heavily in favor of default judgment.

1. Possibility of Prejudice to Plaintiffs

The possibility of prejudice to Plaintiffs is high. In fact, it is almost certain. If this Court does not grant Plaintiffs' motion for default judgment, Plaintiffs will have no means to recover for Defendant's fraud and misrepresentation outside of this action. This weighs heavily in favor of default judgment.

2. Merits of the Claim and Sufficiency of the Complaint

As discussed in Section II(B) above and set out in the Complaint, the merit in Plaintiffs' substantive claim is clear. Steiner sent Automattic a "Digital Millennium Copyright Act - Removal Request" claiming that Hotham "did not have my permission to reproduce this content." (Compl. ¶¶ 31, 33.) However, Steiner knew it was a misrepresentation to tell Automattic that Hotham did not have permission to publish the information in the press release. (Compl. ¶¶ 34-35.) Steiner himself had given Hotham permission by sending him the answers in a press release. Thus, the second and third factors also weigh heavily in favor of default judgment.

3. Amount of Money at Stake

In general, a large sum of money at stake is a factor disfavoring default judgment. *See Eitel*, 782 F.2d at 1472. The sum of money at stake in this case – $10,000 plus costs and attorneys' fees – is relatively modest. Courts in the Ninth Circuit have found similarly small requests for damages to weigh in favor of entry of default judgment. *See, e.g., Family Tree Produce, Inc. v. Bautista*, 13-00364-DOC, 2013 WL 6733576, *4 (C.D. Cal. Dec. 13, 2013) (finding a request for $58,848.12 weighs in favor of entry of default judgment because it is "diminutive in comparison to the money at stake in both *Eitel* [$2.9 million] and *Church Bros.* [$212,259.21]."). In fact, Courts have held that requests substantially higher than the one requested here actually weighed in favor of default judgment because they were "relatively small." *See, e.g., Geller v. World Tech.*, 5:11-CV-01732 EJD, 2011 WL 5825928 (N.D. Cal. Nov. 17, 2011) ($106,228.26); *Church Bros., LLC v. Garden of Eden Produce, LLC*, 11-CV-04114 EJD, 2012 WL 1155656, *3 (N.D. Cal. Apr. 5, 2012) ($212,259.21). Therefore, this factor weighs in favor of default judgment.

4. No Possibility of Disputed Facts

There little possibility of dispute over the material facts in this case. Both Steiner's press release and his takedown notice misrepresenting copyright infringement are in writing. These two documents alone establish liability. Thus, this factor also weighs in favor of default judgment.

5. No Possibility of Excusable Neglect

Defendant's default is not the result of excusable neglect. Plaintiff served Steiner in accordance with the laws of the United Kingdom and England, yet he has not made any effort to appear in this Court.

6. Policy Favoring Resolution on the Merits

Finally, resolution on the merits is impossible as Defendant has made no effort to appear in this court or answer Plaintiffs' Complaint. *See PepsiCo v. Cal. Sec. Cans.*, 238 F. Supp. 2d 1172, 1177 (C.D. Cal. 2002).

III. JURISDICTION

A. Subject Matter Jurisdiction

Federal jurisdiction in this case is clear because Plaintiffs' cause of action is based on a federal law: 17 U.S.C. § 512. The Court can exercise subject matter jurisdiction over such a question of federal law. *See* 28 U.S.C. §§ 1331 and 1338.

B. Personal Jurisdiction

There are two independently sufficient bases for Personal Jurisdiction: (1) consent by agreement to the WordPress Terms of Service, and (2) specific jurisdiction arising out of minimum contacts with the state of California.

1. Steiner Consented to Jurisdiction in California

Steiner consented to this Court's jurisdiction when he agreed to the WordPress Terms of Service. That agreement includes a California choice of law clause and a California venue selection clause. (See Gratz Decl., Ex. A.) The terms of service state,

> [T]his Agreement, any access to or use of the Website will be governed by the laws of the state of California, U.S.A., excluding its conflict of law provisions, and the proper venue for any disputes arising out of or relating to any of the same will be the state and federal courts located in San Francisco County, California.

(*Id.*) Steiner's second and third purported notices show that Steiner was logged in as a WordPress.com user and he could not have become a WordPress user without accepting the WordPress terms of service. (*See* Gratz Decl., Ex. C, D; Sieminski Decl. ¶ 12.)

Accepting a forum selection clause is evidence of consent to personal jurisdiction in that forum. *See SEC v. Ross*, 504 F.3d 1130, 1149 (9th Cir. 2007); *see also Craigslist, Inc. v. Naturemarket, Inc.*, 694 F. Supp. 2d 1039, 1052 (N.D. Cal. 2010). Thus, by accepting the California forum selection clause in the WordPress terms of service, Steiner has consented to personal jurisdiction in California.

Forum selection clauses are presumptively reasonable and the party disputing the validity of the clause bears the burden of showing it is unenforceable. *See Zenger-Miller, Inc. v. Training Team GmbH*, 757 F. Supp. 1062, 1069 (N.D. Cal. 1991). When, as in this case, the defendant does not appear in Court to carry that burden, the clause is enforceable and provides personal jurisdiction in the forum. *See Craigslist*, 694 F. Supp. 2d at 1052.

2. This Action Arises Out of Steiner's Specific Contacts with California

Because, as noted above, Steiner consented to this Court's jurisdiction, the presence or absence of minimum contacts with California does not affect the result. However, as an independent basis for this court's exercise of personal jurisdiction, those minimum contacts are present here. The Ninth Circuit has created a three-prong test for determining whether a case presents sufficient minimum contacts to justify exerting personal jurisdiction over a foreign defendant. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *Schwarzenegger v. Fred Marin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004); *see also Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir. 1987) (personal jurisdiction may arise out of a single transaction if the action arises out of that transaction); *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002). First, the defendant must purposefully avail himself of the privilege of conducting activities in the forum through some act in the forum, thereby invoking the benefits and protections of its laws. *Schwarzenegger*, 374 F.3d at 802 (quoting *Lake*, 817 F.2d 1421). Second, the claim must arise out of the defendant's actions in the forum. *Id.* Finally, exercise of jurisdiction must be reasonable. *Id.* California's long arm statute provides for personal jurisdiction to the full extent the Federal Constitution allows. *See* Cal. Civ. Proc. Code § 410.10. *See also Schwarzenegger*, 374 F.3d at 800-01.

Steiner's actions satisfy all three parts of the test. First, he purposefully directed his takedown notice to Automattic, a company based in California. And, because copyright law does not apply extraterritorially, *see Subafilms, Ltd. v. MGM-Pathe Comm. Co.*, 24 F.3d 1088, 1090 (9th Cir. 1994), Steiner could not have been directing his actions towards the UK where both he and Hotham live; the DMCA has no application there. Instead, by invoking the protections of United States law, he could only have been directing his actions towards the United States, and more specifically, California, where Plaintiff Automattic operates. Second, Plaintiffs' claim arises directly out of Steiner's action in California, because the fraudulent takedown notice itself, submitted in California, violates 512(f). Third,

exercising jurisdiction in this case is reasonable. Defendant, a resident of the United Kingdom, reached across national borders specifically to abuse United States law, which otherwise would not have protected him. It is certainly reasonable to hold him accountable under the very same section of the very same law whose protections he voluntarily invoked. Foreign defendants should not be allowed to reach across national boundaries to abuse a US law without also being subject to the restrictions and requirements of that very same law. Steiner also perpetrated a fraud on Automattic in California. He cannot be heard to complain when Automattic seeks to vindicate its rights in California.

Defendants bear the burden to show that jurisdiction would be unreasonable. *Schwarzenegger*, 374 F.3d at 802; *Doe*, 533 F. Supp. 2d at 1006. Here, Steiner has not carried that burden because he has not appeared.

Although one Court in the Northern District of California declined to exercise personal jurisdiction over a foreign defendant in a 512(f) case where the only basis for jurisdiction was the sending of a DMCA takedown notice to a recipient in California, that case placed particular emphasis on two facts: (1) that no Plaintiff in the case resided in California, so the state had no interest in adjudicating the claim, and (2) that there was pending litigation in another U.S. District Court where the foreign defendant had consented to jurisdiction. *See Doe v. Geller*, 533 F. Supp. 2d 996 (N.D. Cal. 2008). *Geller* does not control this case, because Plaintiff Automattic resides in California and was damaged here, and there is no other pending litigation in another district involving Steiner.

Therefore, it is reasonable to hale this foreign Defendant into this Court for his harm to Automattic and its users.

IV. DAMAGES

Section 512(f) states that a party making knowing misrepresentations in a DMCA takedown notice is liable "for any damages including costs and attorneys' fees, incurred by the alleged infringer . . . or by a service provider . . . ." 17 U.S.C. § 512(f) . Although few courts have addressed the scope of damages under this section, the plain language is very broad, allowing for "any damages," and specifically states that costs and attorneys' fees are appropriate. *Id.* In this case, Plaintiffs have suffered four categories of damages. First, both Automattic and Hotham spent significant resources dealing with Defendant's fraudulent takedown notice. Second, both Plaintiffs have suffered reputational harm –

Hotham as a journalist wrongfully accused of copyright infringement, and Automattic as a service provider forced to take down its user's post on the basis of a misrepresentation. Third, Automattic has incurred costs and attorneys' fees pursuing this litigation to vindicate its right to post the article, which, to date, remains disabled. *See* Oliver Hotham, It's Great When You're Straight Yeah, *not available at* http://oliverhotham.wordpress.com/2013/08/03/its-great-when-youre-straight-yeah/ (last visited May 15, 2014). Fourth and finally, Hotham has suffered damages by Steiner's attempt to silence his viewpoint by abusing the DMCA process.

A. Hotham and Automattic Spent Time Dealing with Meritless Takedown Notices

Automattic received three separate takedown notices from Steiner. Steiner sent the first notice on August 3, 2013, the same day that Hotham posted his article. (*See* Sieminski Decl. ¶ 3; Gratz Decl., Ex. B.) Phil Crumm, an Automattic employee, reviewed and evaluated Steiner's takedown notice and responded on August 6, 2013 to inform him that Automattic had removed Hotham's post. (*Id.* ¶ 4) Crumm also corresponded with Hotham about the counter-notice process required to reinstate his article. (*See* Sieminski Decl. ¶ 5; Gratz Decl., Ex. B.) Steiner sent a second notice on August 12, 2013, which purported to be a DMCA takedown notice, but raised issues of UK harassment and criminal law. (*See* Sieminski Decl. ¶ 6; Gratz Decl., Ex. C.) Phil Crumm reviewed and evaluated Steiner's second notice and responded on August 13, 2013 that WordPress "is in no position to arbitrate content disputes or make legal judgments" and suggested that Steiner would have to file for a court order if he wished to pursue legal action against Hotham other than a DMCA takedown. (*Id.* ¶ 7) Two days later, on August 14, 2014, Steiner sent another purported DMCA takedown notice based on the same content as his second notice. (*See* Sieminski Decl. ¶ 8; Gratz Decl., Ex. D.) Again, Phil Crumm reviewed the notice, and in this case, determined that it did not comply with DMCA requirements because it did not state the content Steiner believed to be infringing. (*Id.* ¶ 9.)

Crumm spent a substantial amount of time evaluating Steiner's meritless takedown notices and corresponding with both Hotham and Steiner. Other Automattic employees have spent time responding to press inquiries about its response to this meritless takedown notice. (*See* Sieminski Decl. ¶ 10.)

For his part, Mr. Hotham spent a substantial amount of time reviewing the takedown notices, researching potential legal options, and responding to Automattic's emails. (*See* Hotham Decl. ¶¶ 6-7.)

B. Hotham and Automattic Suffered Loss of Reputation

Hotham is a student journalist, still crafting and building his journalistic reputation. The media industry takes accusations of plagiarism and copyright infringement very seriously, and the controversy Steiner caused with his knowingly false statements harmed Hotham's reputation. Hotham's article remains down today pending resolution of this litigation, *see* Oliver Hotham, It's Great When You're Straight Yeah, *not available at* http://oliverhotham.wordpress.com/2013/08/03/its-great-when-youre-straight-yeah/ (last visited May 15, 2014), casting an inappropriate and undeserved shadow over his reputation for journalistic integrity.

Automattic operates WordPress.com in an effort to empower a community of bloggers. Automattic is proud that the WordPress source code, which underlies WordPress.com, is not strictly controlled by Automattic, but is open source and available for anyone to work on, change or contribute to. (*See* Sieminski Decl. ¶ 13.) WordPress prides itself on its reputation for allowing its users to use WordPress.com for any lawful purpose they choose. (*See* Sieminski Decl. ¶ 14.) Steiner's fraudulent takedown notice forced WordPress to take down Hotham's post under threat of losing the protection of the DMCA safe harbor. Steiner did not do this to protect any legitimate intellectual property interest, but in an attempt to censor Hotham's lawful expression critical of Straight Pride UK. He forced WordPress to delete perfectly lawful content from its website. As a result, WordPress has suffered damage to its reputation.

C. Automattic Incurred Attorneys' Fees in Pursuing This Litigation

The statute specifically provides for attorneys' fees. In this case, in order to avoid substantial damage to its reputation as an impartial host and service provider of online blog and website hosting that does not censor its users content, WordPress was forced to pursue this litigation, which it would not have done absent these fraudulent takedown notices. To date, Automattic has incurred $14,520 in attorneys' fees. (*See* Gratz Decl. ¶ 8.)

Although one case in the Northern District of California has held that attorneys' fees accrued during a 512(f) litigation are not recoverable, *see Lenz v. Universal Music Corp.*, 07-cv-03783, 2010 WL 702466, at *11 (N.D. Cal. Feb. 25, 2010), that decision runs contrary to the plain language of the statute, which clearly states that a person who makes a knowing material misstatement in a DMCA takedown

notice is liable "for *any* damages *including costs and attorneys' fees*, incurred by the alleged infringer . . . or by a service provider . . . ." 17 U.S.C. § 512(f) (emphasis added). *Lenz* is the subject of a pending appeal, and one of the issues on appeal is the scope of damages available under 512(f). (*See* Joint Stipulation and Order, *Lenz v. Universal Music Corp.*, dated March 1, 2013, Dkt. 461.)

The decision in *Lenz* also conflicts with well-settled canons of statutory construction. That Court based its decision on the notion that awarding attorneys' fees in a 512(f) action would conflict with 17 U.S.C. § 505, which states "[i]n any civil action under this title, the court in its discretion . . . may also award a reasonable attorneys' fee to the prevailing party . . . ." However, the U.S. Supreme Court has frequently stated that when a statute contains both a general provision and a more specific provision applicable to the case, the more specific provision controls. *See Bloate v. U.S.*, 559 U.S. 196, 207 (2010) ("[a] specific provision" . . . "controls one[s] of more general application") (brackets in original); *Nat'l Cable & Telecomm'ns Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 335-36 (2002) ("It is true that specific statutory language should control more general language when there is a conflict between the two."); *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 410 (1999) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one."); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) (same). Section 505 applies generally to "any civil action." Section 512(f) applies specifically to actions for misrepresentations in DMCA takedown notices. Well-settled Supreme Court law requires that a Court resolve any conflict – to the extent one exists – in favor of the more specific provision in 512(f), and award attorneys' fees.

D. Steiner's Actions Chilled Hotham's Speech

The DMCA provides individuals with the power to force large, substantial service providers such as WordPress and YouTube to remove content based only on their say-so. A service provider can only invoke the DMCA safe harbor if it complies with the notice-and-takedown process, in which it cannot exercise its own judgment as to the validity of a takedown notice, but must rely on the counter-notification procedure for the alleged infringer to rectify meritless notices. 17 U.S.C. §§ 512(a), (g). Thus, by invoking the DMCA, an individual threatens a service provider with overwhelming and crippling copyright liability if the service provider refuses to take down the conduct the individual claims

to be infringing. This creates extraordinary potential for abuse, which Congress addressed by creating a cause of action for damages when an individual abuses the system.

In this case, Defendant's statements were demonstrably and knowingly false. This Court should not allow a Defendant to abuse the DMCA process to impose content- and viewpoint-based speech restrictions on others without facing the liability that Congress specifically imposed for doing so fraudulently.

Although, one Court in the Northern District of California has held that damages for chilled speech are not available in a 512(f) action, *see Lenz v. Universal Music Corp.*, 07-cv-03783, 2013 WL 271673, at *8-9 (N.D. Cal. Jan. 24, 2013), the Court in *Lenz* based its decision on facts not present in this case. For instance, in *Lenz*, the plaintiff stated that she "did not care that YouTube declined to host her video." *Id.* By contrast, Hotham has been deeply upset that his article was taken down and continues to stay down pending this litigation, and the situation has affected his decision making process for writing and posting articles since. (*See* Hotham Decl. ¶¶ 10-11.) *Lenz* is the subject of a pending appeal, and one of the issues on appeal is the scope of damages available under 512(f). (*See* Joint Stipulation and Order, *Lenz v. Universal Music Corp.*, dated March 1, 2013, Dkt. 461.)

Hotham estimates that his damages in lost time, harmed reputation, and chilled speech amount to $5,000. Automattic estimates that its damages in lost time and harmed reputation also amount to $5,000.

V. CONCLUSION

For the reasons described above, the Court should enter a default judgment of $5,000 for Hotham, $5,000 for Automattic, and an award of $14,520 in attorneys' fees.

Dated: May 22, 2014

DURIE TANGRI LLP

By: */s/ Joseph C. Gratz*
JOSEPH C. GRATZ

Attorney for Plaintiffs
Automattic Inc. and
Oliver Hotham